



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

CONSTITUTION PETITION NO. 4 OF 2017

**IN THE MATTER OF THE CONSTITUTION OF KENYA 2010 ARTICLES
1,2,3,4,5,10,19,20,21,22,23,27,40,47,**

50,60,63,64,65,67,69,165,259 AND 260

AND

**IN THE MATTER FO ALLEGED CONTRAVENTION OF FUNDAMENTAL RIGHTS AND
FREEDOMS UNDER ARTICLES 1,3,27,28,47 AND 50 OF THE CONSTITUTION**

AND

IN THE MATTER OF THE LAND ADJUDICATION AND SETTLEMENT ACT CAP 284

AND IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT 2015

AND

IN THE MATTER OF THE FOREST ACT 2005

AND

IN THE MATTER OF THE NATIONAL LAND COMMISSION ACT 2012

AND

IN THE MATTER OF THE REGISTRATION OF LANDS ACT 2012

AND

IN THE MATTER OF THE LAND ACQUISITION ACT CAP 195 LAWS OF KENYA

AND

IN THE MATTER OF THE LAND ACT NO. 6 OF 2012

A N D

IN THE MATTER OF THE SETTLEMENT FUND TRUSTEES

A N D

**IN THE MATTER OF THE PROPOSED FORCIBLE ACQUISITION AND/OR RESERVATION,
ALIENATION, GAZZETEMENT, ALLOCATION AND/OR TRANSFER OF LAND
REFERENCE NUMBER 6992/2, TITLE NUMBER LR. NO.3799**

AND

**IN THE MATTER OF PARLIAMENT QUESTION NO. 140 OF 2009 AND ITS REPORT
THEREOF**

AND

**IN THE MATTER OF PARLIAMENTARY COMMITTEE ON LANDS REPORT ON LR. NO.
6992/2**

AND

IN THE MATTER OF LETTER OF ALLOTMENT REF.NO.23558/85

AND

IN THE MATTER OF REGISTRATION OF LR. NO. 6992/2

BETWEEN

CHORLIM MULTIPURPOSE

CO-OPERATIVE SOCIETY LIMITED.....1ST PETITIONER

JOHN KISA NGEYWO.....2ND PETITIONER

JOSEPH NAIBEI BERRA.....3RD PETITIONER

VERSUS

THE HON. ATTORNEY GENERAL.....1ST RESPONDENT

THE NATIONAL LAND COMMISSION.....2ND RESPONDENT

THE ECOSYSTEM CONSERVATOR

TRANS-NZOIA COUNTY.....3RD RESPONDENT

THE DIRECTOR OF KENYA

FOREST SERVICES.....4TH RESPONDENT

THE LAND PRINCIPAL SECRETARY,

MINISTRY OF LANDS, HOUSING AND

URBAN DEVELOPMENT.....5TH RESPONDENT

THE DIRECTOR OF SURVEYS MINISTRY OF LANDS,

HOUSING AND URBAN DEVELOPMENT.....6TH RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION

AND SETTLEMENT, MINISTRY OF LAND,

HOUSING AND URBAN DEVELOPMENT.....7TH RESPONDENT

THE LAND ADJUDICATION AND SETTLEMENT OFFICER,

TRANS-NZOIA COUNTY.....8TH RESPONDENT

THE CHIEF LAND REGISTRAR.....9TH RESPONDENT

THE DISTRICT LAND REGISTRATION

TRANS-NZOIA COUNTY.....10TH RESPONDENT

R U L I N G

1. On 23/10/2017 when the application dated 11/7/2017 came up for hearing Prof. Sifuna, Counsel for the 3rd and 4th respondent made an application for orders that the deponent of the replying affidavit of the 2nd respondent be summoned for cross examination at the interlocutory stage of these proceedings. Counsel gave reasons for his application. He said that the guidelines of public service are set out in the Constitution and the averments of the deponent of the 2nd respondent's affidavit are adverse to the duty of a public officer in protecting public land.

2. Further, he stated that he was served with a photocopy and that the affidavit may be a forgery. Counsel also submitted that there has been previous litigation over the subject matter of this petition and that it would be imprudent to have this matter heard before the older files are availed and examined by court and parties.

3. Mr. Odongo, counsel for the 1st, 5th, 6th, 7th, 8th, 9th and 10th respondents supported the application by counsel for the 3rd and 4th respondents.

4. Mr. Murgor, counsel for the petitioners opposed the application, saying that the 2nd respondent is an independent commission. He urged the court to allow the parties to proceed with the application on the basis of the documents filed in court. He further urged that the other respondents cannot be heard to want to cross examine the deponent of the 2nd respondent's replying affidavit, but that they should prosecute their defences "independently". He submitted that the 2nd respondent is a commission established under **Article 67 of the Constitution** and that it had functions under the Constitution and the National Land Commission Act. He stated that the National Land Commission is the custodian of all public land and that it advises all other agencies on public land.

5. I have considered the rival submissions of the parties in this matter. Notably counsel for the 2nd respondent was not present to defend the affidavit or give reasons why the cross examination of deponent to the 2nd respondent's replying affidavit dated 19/9/2017.

6. In my opinion, though, cross examination of deponents can be ordered at any stage of any proceedings if it will serve to meet the ends of justice. In the current case it is being sought in respect of a conservatory order application. The principles upon which a conservatory order can be granted by the court are well known and they will be applied when the application is heard.

7. For now, I find it unnecessary to order cross examination of the deponent though it may be necessary at

a later stage in the proceedings if the parties so desire. The matters which the parties desire to cross examine the deponent on go to the root of the merits of the substantive petition. It would be counter-productive to have piecemeal hearings of the petition by ordering the cross examination of the deponent at the interlocutory stage. In saying this I have noted that paragraph 2 of the 2nd respondent's replying affidavit states that the replying affidavit is sworn in response to the main petition and the affidavit it support thereof. The time will surely come when cross examination may be ordered.

8. I therefore order that the parties do prepare for the hearing of the application dated 11/7/2017 so that a ruling thereon may issue to pave the way for the expeditious hearing of the substantive petition.

Dated, signed and delivered at Kitale on this 31st day of October, 2017.

MWANGI NJOROGE

JUDGE

31/10/2017

Coram: Before Mwangi Njoroge - Judge

Court Assistant – Picoty

Mr. Analo holding brief for Murgor for the petitioners

Ms. Bett holding brief for Prof. Sifuna for the 3rd and 4th respondents

N/A for the Attorney General.

COURT

Ruling read in open court in the presence of counsel for the parties.

MWANGI NJOROGE

JUDGE

31/10/2017